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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

TAMARA DE KAUWE, Plaintiff and Respondent, v. JASON BERGSTROM, Defendant and Appellant.	B286535 (Los Angeles County Super. Ct. No. BC548079)

APPEAL from an order of the Superior Court of Los Angeles County, Barbara Marie Scheper, Judge. Affirmed.

No appearance for Plaintiff and Respondent.

The Fullman Firm, Adam C. Fullman, Christopher J. Peters and Sam Dehbozorgi for Defendant and Appellant.

INTRODUCTION

Jason Bergstrom appeals the trial court's order denying his motion under Code of Civil Procedure section 473.5 (section 473.5) to set aside for lack of actual notice the entry of default and default judgment against him and in favor of Tamara De Kauwe. The trial court ruled Bergstrom was not entitled to relief under section 473.5 because he did not meet his burden to show, among other things, his claimed lack of actual notice was not caused by his avoidance of service. Because the evidence does not compel a contrary finding as a matter of law, we affirm.

PROCEDURAL AND FACTUAL BACKGROUND

De Kauwe filed this action against Bergstrom, North American Chemical Services, Inc., North American Environmental Services, Inc., and Bergstrom Home, alleging, among other causes of action, sexual harassment, gender discrimination, retaliation, violation of the Unruh Civil Rights Act, and wrongful termination in violation of public policy. De Kauwe alleged Bergstrom sexually harassed her while she worked for him in various capacities, including as an executive assistant. De Kauwe alleged Bergstrom's harassment included making statements and sending messages that subjected her "to a quid pro quo, sexually charged work environment," such as asking "Would there be sex if I took you to Israel with me in November," saying "what a horny little girl you are," asking "If I were not married and I proposed to you would you marry me," saying "So being the mother of my children is just over the top," and asking "What is it like being such a hot woman." De Kauwe

also alleged that, when she complained, Bergstrom terminated her employment.

Bergstrom, represented by counsel, answered the complaint, propounded and responded to discovery, and "set up a mediation to resolve this case." He subsequently substituted himself for his attorney and ceased to participate in the litigation. Bergstrom admits he "did not respond to numerous and substantial efforts by [De Kauwe's] counsel to subject him to the discovery process." Bergstrom also admits that, after he failed three times to appear for a court-ordered deposition, the trial court struck his answer and entered his default.

After unsuccessfully attempting to obtain a default judgment, De Kauwe filed a first amended complaint seeking in excess of $4 million in damages.[1] Bergstrom admits De Kauwe

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[1] De Kauwe's original complaint did not specify an amount of damages. (See *Sass v. Cohen* (2019) 32 Cal.App.5th 1032, 1042 [trial court can "give the plaintiff the option of amending her pleadings to include the previously omitted types or amounts of relief (but, in so doing, granting the defendant a further opportunity to avoid default by responding to the amended pleadings)"]; *Julius Schifaugh IV Consulting Services, Inc. v. Avaris Capital, Inc.* (2008) 164 Cal.App.4th 1393, 1397 [plaintiff can amend the complaint to allege the proper amount]; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2018) ¶¶ 5:242-5:243 ["[g]eneral demands in the prayer do not provide adequate notice of the relief sought to support a default judgment," and "[i]f no specific damages are alleged in the complaint, a prayer '*for such other and further relief as the court deems just*' will not support a default judgment for any specific sum"].) We augment the record to include the original and first amended complaints. (See Cal. Rules of Court, rule 8.155(a)(1)(A).)

made "extensive efforts to attempt to effectuate service of process of the [first amended complaint] upon [Bergstrom]." After De Kauwe's efforts to serve Bergstrom failed, the court granted her request to serve the first amended complaint by publication, which she did. Bergstrom did not respond. Following a default prove-up hearing, the court entered a default judgment in favor of De Kauwe and against Bergstrom, North American Environmental Services, Inc., and North American Chemical Services, Inc., jointly and severally, for over $900,000 in damages, attorneys' fees, and costs.[2]

Two months later, Bergstrom filed a motion to set aside the default judgment, which the trial court denied. The court stated "it is clear to the court that [Bergstrom] was either avoiding service or he inexcusably failed to participate in the action after he appeared." The court found: "This is not a situation where defendant had no idea a lawsuit was pending against him and the publication was made in the wrong city. Defendant had already subjected himself to the jurisdiction of this court and opted to represent himself. If defendant was not actively avoiding service, his conduct was certainly inexcusable."

DISCUSSION

Bergstrom argues the trial court erred in denying his motion to vacate the default judgment under section 437.5.[3] He

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[2] We augment the record to include the default judgment.

[3] In the trial court, Bergstrom argued the entry of default and the default judgment should be vacated because they were void for lack of proper service of process (Code Civ. Proc., § 473,

argues that, although he "had knowledge of the action against him, he did not have actual knowledge of the [First Amended Complaint]" because publication in a San Diego newspaper did not give him actual notice of the first amended complaint "with the new $4,000,000.00 damage claim."

A. *Applicable Law and Standard of Review*

Section 473.5 authorizes a trial court to set aside the entry of a default or a default judgment for lack of actual notice. Section 473.5, subdivision (a), provides: "When service of summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action." Section 473.5, subdivision (b), requires that the motion "be accompanied by an affidavit showing under oath that the party's lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect." (See *Sakaguchi v. Sakaguchi* (2009) 173 Cal.App.4th 852, 861; *Anastos v. Lee* (2004) 118 Cal.App.4th 1314, 1319.) If the trial court finds the party's lack of actual notice was not caused by his or her avoidance of service or inexcusable neglect, the court "may set aside the default or default judgment on whatever terms as may be just and allow the party to defend the action." (§ 473.5, subd. (c).) In general, we review an order denying a motion under section 473.5 to set aside a default judgment for abuse of discretion. (*Anastos*, at p. 1318; *Ellard v. Conway* (2001) 94 Cal.App.4th 540, 547.)

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subd. (d)) and because of extrinsic fraud. Bergstrom does not make those arguments on appeal.

"A defendant seeking vacation of a default judgment entered against him must . . . show that his lack of actual notice in time to defend the action was not caused by his inexcusable neglect or avoidance of service." (*Tunis v. Barrow* (1986) 184 Cal.App.3d 1069, 1077-1078; see *Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 180.) Because the trial court found Bergstrom failed to make this factual showing, we review the trial court's finding to determine whether the evidence compels a contrary finding as a matter of law. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 570-571; *Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 734; *Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013) 218 Cal.App.4th 828, 838; see *Glovis America, Inc. v. County of Ventura* (2018) 28 Cal.App.5th 62, 71 [where the appellant fails to meet his or her burden of proof on an issue, "we must determine whether [the appellant's] evidence was uncontradicted, unimpeached, and of such weight that there is no possibility it was insufficient to support" the trial court's finding].)

B. *The Evidence Does Not Compel a Finding in Favor of Bergstrom*

The evidence does not compel a finding as a matter of law that Bergstrom did not avoid service of process. Bergstrom had two California residences, one in Templeton and one in Bakersfield, at the time De Kauwe attempted to serve him with the first amended complaint.[4] The Templeton address was in a gated community in a rural area. There was only one entrance to

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[4] We augment the record to include the declaration of Jason Bergstrom in support of the motion to set aside the default and default judgment.

the community, which required a code to get through the gate. A process server tried three times to access Bergstrom's residence in the gated community. On his third attempt, the process server got past the entrance gate and located Bergstrom's home, but encountered a second locked gate with a keypad. He left a note on the keypad, but he never received a response.

The Bakersfield address was also in a gated community, and a process server twice attempted to serve Bergstrom there. During the process server's second visit to the Bakersfield property, the person Bergstrom had hired to care for the property while he was in Templeton told the process server Bergstrom had "moved." The process service also reported that a "[f]emale next door [also] said [Bergstrom had] moved." In response to this evidence, Bergstrom stated in his declaration, "I never instructed [the caretaker] or anyone else to make this alleged statement and I do not know why this alleged statement was made."

In addition, Bergstrom was the designated agent for service of process for North American Chemical Services, Inc., one of the other defendants in this action. The address for Bergstrom as the agent for service of process for that company was in San Diego. (See Corp. Code, § 12570, subd. (b) [every corporation must designate an agent for service of process and file a statement containing that person's business or residence address].) A process server attempted to serve Bergstrom at the company's San Diego address, but a male "concierge" said Bergstrom had moved. In response to this evidence, Bergstrom stated he sold the San Diego property several months before De Kauwe attempted to serve the first amended complaint.

This evidence supported different reasonable inferences about whether Bergstrom avoided service. The trial court

credited one of those inferences: Bergstrom avoided service by hiding behind locked gates that made access to him and his homes difficult, instructing his Bakersfield caretaker, the San Diego concierge, and others to lie about his whereabouts and tell process servers he had moved (without providing any forwarding information), and ignoring the note the process server left at Bergstrom's Templeton residence. In light of false statements by Bergstrom's employee and his neighbor that Bergstrom had moved from the Bakersfield address, the trial court reasonably discredited Bergstrom's assertion he did not know why they lied. And, notwithstanding Bergstrom's claim he sold the San Diego property, the trial court could reasonably infer the concierge there lied when he said Bergstrom no longer lived or worked at that address. The weight and character of Bergstrom's evidence did not compel a finding he was not avoiding service.[5] The trial court did not abuse its discretion in denying the motion.

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[5] Section 473.5, subdivision (b), also requires the moving party to "serve and file with the notice a copy of the answer, motion, or other pleading proposed to be filed in the action." Bergstrom did not comply with that requirement either. (See *Sakaguchi v. Sakaguchi*, *supra*, 173 Cal.App.4th at pp. 861-862 [trial court properly denied a motion to set aside the default judgment where the moving party did not "submit an answer, motion, or other pleading, as required by statute"]; *Anastos v. Lee*, *supra*, 118 Cal.App.4th at p. 1319 ["[a]bsent a proper affidavit or declaration [as required by section 473.5, subdivision (b)], the trial court properly denied the defendants' motion"].)

DISPOSITION

The order is affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J.

STONE, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.